

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

Dale A. and Sonia S. Barcus,

Chapter 7

Debtor(s).

BK 04-34293 GFK

NOTICE OF HEARING ON MOTION TO DISMISS CHAPTER 7 CASE

TO: The Debtor, all creditors and other parties in interest:

The United States Trustee has filed a motion to dismiss the above-captioned case for substantial abuse under 11 U.S.C. §707(b).

The Court will hold a hearing on this motion at 2:00 P.M. on November 23, 2004, in Courtroom No. 228 B, at the United States Bankruptcy Court, United States Courthouse, at 316 N. Robert Street, in St. Paul, Minnesota.

Any response to this motion must be filed and delivered not later than November 18, 2004, which is three days before the time set for the hearing (excluding intermediate Saturdays, Sundays and legal holidays), or filed and served by mail not later than November 12, 2004, which is seven days before the time set for the hearing (excluding intermediate Saturdays, Sundays and legal holidays). Local Bankruptcy Rule 9006-1.

Dated: _____

CLERK OF BANKRUPTCY COURT

By: _____
Deputy Clerk

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

Dale A. and Sonia S. Barcus,

Chapter 7

Debtor(s).

BK 04-34293 GFK

NOTICE OF HEARING AND MOTION TO DISMISS UNDER 11 U.S.C. § 707(b)

TO: The debtor(s) and other entities specified in Local Rule 9013-3.

1. The United States Trustee, by his undersigned attorney, moves the Court for the relief requested below and gives notice of hearing.

2. The Court will hold a hearing on this motion at 2:00 P.M. on November 23, 2004, in Courtroom No. 228 B, at the United States Bankruptcy Court, United States Courthouse, at 316 N. Robert Street, in St. Paul, Minnesota.

3. Any response to this motion must be filed and delivered not later than November 18, 2004, which is three days before the time set for the hearing (excluding intermediate Saturdays, Sundays and legal holidays), or filed and served by mail not later than November 12, 2004, which is seven days before the time set for the hearing (excluding intermediate Saturdays, Sundays and legal holidays). Local Bankruptcy Rule 9006-1. UNLESS A RESPONSE OPPOSING THE MOTION IS TIMELY FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING.

4. This Court has jurisdiction over this motion pursuant to 28 U.S.C. Sections 157 and 1334, FED.R.BANKR.P. 5005 and Local Rule 1070-1. The United States Trustee has standing to file this motion pursuant to 28 U.S.C. Section 586(a) and 11 U.S.C. Section 307. This proceeding

is a core proceeding. The petition commencing this Chapter 7 case was filed on July 25, 2004. The case is now pending in this Court.

5. This motion arises under 11 U. S. C. Section 707(b) and FED.R.BANKR.P. 1017, 2002 and 4004. This motion is filed under FED.R.BANKR.P. 9014 and Local Rules 9013-1 to 9013-5. Movant requests that this case be dismissed.

6. From the lists, schedules and statements filed by the debtors, it appears that they have the ability to pay a substantial portion of their dischargeable debt without hardship.

7. The debtors list the following debts:

- (a) On Schedule D, Creditors Holding Secured Claims, the debtors list two claims totaling \$ 279,087.00 secured by a first and second mortgage on the homestead.
- (b) On Schedule E, Creditors Holding Unsecured Priority Claims, the debtors list no claims.
- (c) On Schedule F, Creditors Holding Unsecured Nonpriority Claims, the debtors list nineteen claims totaling \$ 69,633.00.

8. The debts listed in the debtors' Schedule of Liabilities appear to be primarily consumer debt. *See* Debtors' Schedule F. The debtors checked on the Petition that the nature of the debts are consumer/non-business.

9. On Schedule I, the debtors list monthly net income of \$ 5,261.00. The debtors are married and list three minor aged dependents. On September 22, 2004, the United States Trustee wrote to the debtors for additional financial information. *See* Att. Ex. 1. The debtors responded on October 13, 2004. *See* Att. Ex. 2 (without attachments).

Based on the debtors income tax history, it appears they are over-withholding their taxes.

Year	Total Income	Tax Refunds
2003	\$ 198,451.00	\$ 16,979.00
2002	\$ 141,217.00	\$ 18,575.00
2001	\$ 80,727.00	\$ 14,705

Based on Schedule I monthly gross income listed of \$ 8,835.00, tax withheld through September 15, 2004 per pay stub and 2003 tax return information, the proper calculation withholding is as follows:

Gross per Schedule I	\$ 8,835.00
Less	
Monthly Insurance	(284)
Medicare Tax	(128)
Max. SS Tax of \$5,450.00 for 2004 divided by 12 months	(454)
Federal Tax of \$ 6,994 per IRS W/H calculator divided by 12 months	(583)
Estimated monthly state tax using 2004 and tax return information	(365)
Adjusted Monthly net using proper withholding amounts	\$ 7,021.00

10. On Schedule J, the debtors list monthly expenses of \$ 5,818.00.

The debtors also list an excessive auto payment of \$ 1,169.00 for two leased vehicles, a 2003 Volkswagen Passat and a 2004 GMC Yukon. This amount is excessive and should be reduced by \$ 469.00 or more. *In re Mathes*, 1996 WL 1055813, *3 (Bankr. D. Minn. Aug. 21, 1996) (“[A] debtor should be able to “obtain, finance, and operate a perfectly serviceable [automobile] for no more than \$ 300.00 per month, and possibly less. This, then, is the maximum sum that should be attributed to his budget for transportation expenditures.”); *see also In re Wilkens*, 1997 WL 1047545, *3 (Bankr. D. Minn. March 26, 1997) (holding that \$ 275.00 - 300.00

for installment payments, \$ 75.00 - \$ 100.00 for costs of operation of vehicle, and insurance cost was sufficient).

Adjusted Schedule J expenses are \$ 5,349.00.

11. Average net monthly income of \$ 7,021.00 less monthly expenses of \$ 5,349.00 provides the debtors with monthly disposable income of \$ 1,672.00.

12. Monthly disposable income of \$ 1,672.00 would enable the debtors to pay approximately \$ 69,633.00 or 86 % of the unsecured creditors in a hypothetical thirty six month Chapter 13 plan. The debtors can pay the unsecured creditors in full in forty two months with monthly payments of \$ 1,672.00.

13. The debtor, Mr. Barcus, is currently employed, and there does not appear to be any likelihood that his employment will be terminated at any time in the future.

14. The debtors have the ability to repay a substantial portion of their general unsecured debt and there appears to be no reason for their unwillingness to do so.

15. As an alternative to dismissal, the United States Trustee does not oppose voluntary conversion of this case to Chapter 13.

WHEREFORE, the United States Trustee respectfully requests that this chapter 7 case be dismissed.

Dated: October 25, 2004

Respectfully submitted,

HABBO G. FOKKENA
United States Trustee
Region 12

By: /s/ Sarah J. Wencil
Sarah J. Wencil
Trial Attorney
United States Trustee's Office
1015 United States Courthouse
300 South Fourth Street
Minneapolis, MN 55415
IA ATTY No. 14014
(612) 664-5500

EXHIBIT 1



U. S. Department of Justice

Office of the United States Trustee

***Districts of Minnesota, North Dakota,
South Dakota and Iowa***

September 22, 2004

Joseph Kelly
12400 Portland Avenue South
Suite 120
Burnsville, MN 55337

*U.S. Courthouse, Suite 1015
300 South Fourth Street
Minneapolis, MN 55415*

*612 / 664-5500
FAX 612 / 664-5516*

Re: Dale & Sonia Barcus
Bky 04-34293

Dear Mr. Kelly,

As you are aware, the Office of the United States Trustee must investigate every debtor pursuant to 11 U.S.C. §707(b). Please provide the following documentation/information on or before October 8, 2004;

1. Copies of the last four pay stubs for each debtor (if applicable for Ms. Barcus). If the pay stubs show a deduction for 401(k) or similar retirement plan, please advise if the deduction is voluntary or mandatory. If the pay stubs show a deduction for 401(k) loan repayment, please advise as to the balance of the loan and the estimated payoff date.
2. Copies of 2001, 2002, and 2003 state and federal tax returns, including W-2s, 1099s, and all other attachments and schedules.
3. Copies of bank statements and check registers for the last six months for all accounts owned by the debtors.
4. Copies of bills, invoices, canceled checks, etc., for the last six months for Cable TV, internet, cell phone (\$398/month on Schedule J) and medical/dental expenses (\$200/month on Schedule J).

Please call if you have a question or concern about this letter. Thank you for your assistance in this matter.

Sincerely,

HABBO G. FOKKENA
United States Trustee

By Tom Kleiner
Tom Kleiner
Bankruptcy Analyst

cc: Dale & Sonia Barcus
16076 Mallard Way
Prior Lake, MN 55372

Patti Sullivan, Chapter 7 Trustee

EXHIBIT 2

REQUESTED

Debits

U. S. Department of Justice

Office of the United States Trustee

*Districts of Minnesota, North Dakota,
South Dakota and Iowa*

U.S. Courthouse, Suite 1015

300 South Fourth Street

Minneapolis, MN 55415

612 / 664-5500

FAX 612 / 664-5516

Bky 04-34293

COPY

Dear Mr. Kelly,

As you are aware, the Office of the United States Trustee must investigate every debtor pursuant to 11 U.S.C. §707(b). Please provide the following documentation/information on or before October 8, 2004:

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Please call if you have a question or concern about this letter. Thank you for your assistance in this matter.

Sincerely,

HABBO G. FOKKENA
United States Trustee

By Tom Kleiner
Tom Kleiner
Bankruptcy Analyst

OFFICE OF THE
UNITED STATES TRUSTEE

2004 OCT 13 A 9:35

RECEIVED

VERIFICATION

I, Sarah J. Wencil, trial attorney for the United States Trustee, the movant named in the foregoing motion, declare under penalty of perjury that the foregoing is true and correct according to the best of my knowledge, information and belief.

Executed on: October 25, 2004

Signed: /s/ Sarah J. Wencil
Sarah J. Wencil
Trial Attorney

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

Dale A. and Sonia S. Barcus,

Chapter 7

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MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

The United States Trustee submits this memorandum in support of his motion to dismiss this case under 11 U.S.C. § 707(b). *See* Local Rule 9013-2(a).

Analysis

A Motion to Dismiss for Substantial Abuse is governed by Section 707(b) of the Bankruptcy Code, which provides:

After notice and a hearing, the court, on its own motion or on a motion by the United States trustee but not at the request or suggestion of any party in interest, may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts if it finds that the granting of relief would be a substantial abuse of the provisions of this chapter. There shall be a presumption in favor of granting the relief requested by the debtor. In making a determination whether to dismiss a case under this section, the court may not take into consideration whether a debtor has made, or continues to make charitable contributions (that meet the definition of ‘charitable contribution’ under section 548(d)(3)) to any qualified religious or charitable entity or organization (as that term is defined in section 548(d)(4).

11 U.S.C. § 707(b) (1994) (as amended by Religious Liberty and Charitable Donation Protection Act of 1998). The United States Trustee bears the burden of showing substantial abuse. *In re Dubberke*, 119 B.R. 677, 679 (Bankr. S.D. Iowa 1990).

(1) The Debtor's Debts Are Primarily Consumer Debts.

Section 101(8) of the Bankruptcy Code defines "consumer debts" as "debt incurred by an individual primarily for a personal, family, or household purpose." 11 U.S.C. § 101(8) (1994). "Debt" is defined as a "liability on a claim." 11 U.S.C. § 101(12) (1994). "Claim" is defined as a "right to payment, whether or not such right is reduced to judgment, liquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." 11 U.S.C. § 101(5)(A) (1994).

The purpose of the debt generally determines whether a debt is a consumer debt. *Zolg v. Kelly (In re Kelly)*, 841 F.2d 908, 913 (9th Cir. 1988); *In re Palmer*, 117 B.R. 443, 446 (Bankr. N.D. Iowa 1990). If the credit transaction does not involve a business transaction or a profit motive, it is usually regarded as a consumer debt. *Palmer*, 117 B.R. at 446 (citing *In re Booth*, 858 F.2d 1051, 1054-55 (5th Cir. 1988)); *In re Berndt*, 127 B.R. 222, 223 (Bankr. D.N.D. 1991) (citing *Kelly* and *Booth*, but distinguishing *Booth* by concluding that private investment debts, not used to further an ongoing business, were consumer debts).

In the present case, it appears that the debts listed on Schedule F are primarily consumer debts. The debtors checked on the Petition that the nature of the debts are consumer/non-business.

**(2) The Granting of Relief under Chapter 7 Constitutes
Substantial Abuse of Chapter Seven of the Bankruptcy Code.**

To satisfy the "substantial abuse" standard under Section 707(b), the Eighth Circuit has ruled that the primary consideration is whether the debtor has the ability to fund a 13 plan. *In re Walton*, 866 F.2d 981, 984 (8th Cir. 1989) (following *In re Kelly*, 841 F.2d 908, 914-15 (9th Cir. 1988); *United States Trustee v. Harris*, 960 F.2d 74, 76 (8th Cir. 1992); *Fonder v. United States*, 974 F.2d 996, 999 (8th Cir. 1992); *Huckfeldt v. Huckfeldt (In re Huckfeldt)*, 39 F.3d 829,

831 (8th Cir. 1994) (comparing § 707(b) to § 707(a)).

While bad faith on the part of the debtor may constitute substantial abuse under Section 707(b), bad faith is not required to be shown to satisfy the "substantial abuse" standard when the debtor is otherwise able to repay his or her debts out of future income:

This is not to say that inability to pay will shield a debtor from section 707(b) dismissal where bad faith is otherwise shown. But a finding that a debtor is able to pay his debts, standing alone, supports a conclusion of substantial abuse.

Walton, 866 F.2d at 985 (quoting *In re Kelly*, 841 F.2d at 914-15); *Harris*, 960 F.2d at 76 (stating that "egregious behavior" by the debtor is not a necessary element for a Chapter 7 case to be dismissed under Section 707(b)). While the unique hardships and the good faith of the debtor are relevant factors, those factors are not as important as the ability of the debtor to fund a Chapter 13 plan. *Walton*, 866 F.2d at 983; *see also Harris*, 960 F.2d at 77 (rejecting the "totality of the circumstances" test espoused by the Fourth Circuit Court of Appeals in *Green v. Staples (In re Green)*, 934 F.2d 568, 572 (4th Cir. 1991), in favor of examining whether a debtor may fund a Chapter 13 plan out of future income).

Whether the debtor is eligible to file a petition under Chapter 13 after a Section 707(b) dismissal is also not a relevant factor, and likewise, the debtor cannot be forced to file a Chapter 13 petition after a 707(b) dismissal order is entered if the debtor is qualified for Chapter 13 relief. *Fonder*, 974 F.2d at 999. "The essential inquiry remains whether the debtor's ability to repay creditors with future income is sufficient to make the Chapter 7 liquidating bankruptcy a substantial abuse of the Code." *Id.*

In addition, the Eighth Circuit holds that a bankruptcy court may reject the credibility of amended schedules when the amendments are offered after a Section 707(b) motion is filed and the

amended schedules seek to decrease income and/or increase expenses because the debtor swore as to the accuracy of the initial schedules. *Fonder*, 974 F.2d at 1000.

In the District of Minnesota, there is no set percentage of repayment that must be met for substantial abuse to be present. The District Court of Minnesota opines that the determination of what is substantial should be made on a case-by-case basis:

In this Circuit, there is no clear cut formula or quantitative, threshold percentage of debt that must be repaid under a Chapter 13 plan in order to constitute grounds for dismissal for "substantial abuse." See *Walton*; *Fonder*; see also *In re Schmidt*, 200 B.R. 36, 38 (Bankr. D. Neb. 1996).... Rather, (and until such a threshold is articulated), Bankruptcy Courts are to use their best judgment to determine what repayment percentage is appropriate on a case-by-case basis. Considering the record before it, the Bankruptcy Court concluded, without comment, that a 35% repayment plan over a three year term was sufficient to constitute "substantial abuse." After conducting a *de novo* review of the record, this Court agrees. An ability to contribute more than \$17,000 towards \$ 44,000 of unsecured debt is "substantial."

Mathes v. Stuart (In re Mathes), Civil File No. 3-96-906, slip op. at 6-7 (D. Minn. July 2, 1997)
See also In re Shirley Wilkins, 1997 WL 1047545 (Bankr. D. Minn. March 26, 1997) (Kishel, J.)
(holding that the ability to pay 28% in three years or 49% in five years of unsecured debts was a substantial abuse under § 707(b)).

In the present case, the debtors have the ability to pay \$ 69,633.00 or 86 % of the unsecured creditors in a hypothetical thirty six month Chapter 13 plan. The debtors can pay the unsecured creditors in full in forty two months with monthly payments of \$ 1,672.00. The ability to fund a Chapter 13 plan is grounds to dismiss this case for substantial abuse under Section 707(b).

WHEREFORE, the United States Trustee submits this memorandum in support of his motion to dismiss the above-captioned case as a substantial abuse of the Bankruptcy Code.

Dated: October 25, 2004

Respectfully submitted,

HABBO G. FOKKENA
United States Trustee
Region 12

By: /s/ Sarah J. Wencil
Sarah J. Wencil
Trial Attorney
United States Trustee's Office
1015 United States Courthouse
300 South Fourth Street
Minneapolis, MN 55415
IA ATTY No. 14014
(612) 664-5500

**UNITED STATES BANKRUPTCY COURT
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Chapter 7

Debtor(s).

BK 04-34293 GFK

CERTIFICATE OF MAILING

I, Emily Rohr, certify under penalty of perjury that I am an employee in the Office of the United States Trustee for the District of Minnesota and am a person of such age and discretion as to be competent to serve papers.


That on October 25, 2004, I served a copy of the Proposed Notice of Hearing, Motion to Dismiss Under 11 U.S.C. §707(b), Memorandum of Law in Support of Motion to Dismiss; and proposed Order in the above-referenced case by placing said copy in a postpaid envelope addressed to the person(s) hereinafter named, at the place and address stated below, which is the last known address, and by depositing said envelope and contents in the United States Mail at Minneapolis, Minnesota.

Addressee(s):

Joseph L. Kelly
Kelly Law Office
12400 Portland Avenue S., Suite 120
Burnsville, MN 55337

Patti J. Sullivan
P.O. Box 16406
St. Paul, MN 55116

Dale A. and Sonia S. Barcus
16076 Mallard Way
Prior Lake, MN 55372



Office of the United States Trustee
Emily Rohr

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

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ORDER

At St. Paul, Minnesota, the _____ day of _____, 2004, the United States Trustee's Motion to Dismiss under 11 U.S.C. § 707(b) came before the Court for hearing.

Appearances were noted in the record.

The Court made its findings of fact and conclusions of law on the record pursuant to Rule 52 of the Federal Rules of Civil Procedure and Bankruptcy Rule 7052.

IT IS HEREBY ORDERED:

That the Chapter 7 bankruptcy case filed by the above-captioned debtors is dismissed pursuant to 11 U.S.C. Section 707(b).

The Honorable Gregory F. Kishel
United States Bankruptcy Judge